

Arizona Department of
Economic Security



Appeals Board

Appeals Board No. T-1030878-001-B

In the Matter of:

XXX XXXXXXXX'X XXXXXXXX XXX
XXXXXXXX XXX
XXXX: XXXXXXXX XXXXXXXX
XXXXX X XXX^{XX} XX
XXXXXXXXXXXX, XX XXXXX-XXXX

EA, UI TAX SECTION, CFP/CLA
% ROBERT J DUNN
ASST ATTORNEY GENERAL
1275 W WASHINGTON ST - SC O40A
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
REVERSED

The **EMPLOYER** XXXitioned for a hearing from the Reconsidered Determination issued on July 6, 2005, which affirmed the Determination of Liability for Employment or Wages issued by the Department on January 17, 2002 (Bd. Exh. 19C). The XXXition for hearing also involved the Determination of Liability for Employment or Wages issued by the Department on January 17, 2002 (Bd. Exh. 19D). The Reconsidered Determination held that:

... we must conclude that the preponderance of evidence here establishes that services performed by individuals as XXXXXXXXXXXXX constituted employment; and that the remuneration paid to these individuals constituted wages. (Bd. Exh. 19A/B).

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

At the direction of the Appeals Board, an in-person hearing was held before ROBERT T. NALL, an Administrative Law Judge, on **Wednesday, July 18, 2007**. At the hearing, the parties were given an opportunity to present evidence on the following issues:

1. Whether the employing unit is liable for Arizona Unemployment Insurance taxes pursuant to the Notice of Assessment Report dated January 17, 2002, for the quarters ending March 31, 2000 through December 31, 2001, under A.R.S. § 23-613.
2. Whether services performed by individuals as XXX-XXXXXXX constituted "employment" effective January 1, 2000, as defined in A.R.S. § 23-615, and are not "exempt" or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
3. Whether remuneration paid to individuals for such services constitutes "wages", as defined in A.R.S. § 23-622, which must be reported and on which State taxes for Unemployment Insurance are required to be paid.

The following persons appeared at the hearing: one Employer witness who testified, Employer's counsel, one Department witness who testified, the Assistant Attorney General as the Department's counsel, and an observer. At the hearing, Board Exhibits 1 through 33 were admitted into the record as evidence.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer is a Limited Liability Corporation. It has operated its business from the home of its owners since June 1998. The business provided XXX-XXXXXXX XXX XXX XXXXXXX in or at the homes of the XXX XXXXXXX. (Tr. pp. 7, 63; Bd. Exh. 15).
2. XXX-XXXXXXX XXXXXXXXXX were performed by individuals who received 4-10 hours of orientation from the business owners. Security codes and keys to client homes were distributed to these individuals by the XXXXXXXXXX. (Tr. pp. 13, 28, 43, 73).
3. The XXX XXXXXXX specified, in writing, the times of day each XXX-XXXXXXX visit should occur, and specified the tasks to be performed such as XXXXXXX, XXXXXXX, XXXXXXX, XXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX. All of the XXX-XXXXXXX used their own vehicles and XXXXXXX XXXXXXXXXX, without reimbursement from the Employer. All of the XXX XXXXXXX provided food, water, and medications for use by the XXX-XXXXXXX in conjunction with the owner's specifications. The business did not provide any of the XXX-XXXXXXX with transportation, insurance, an office, a phone, or any materials beyond a copy of the services requested by each XXX XXXXXXX (Tr. pp. 30, 31, 42, 89, 90).

4. The business paid each XXX-XXXXXX a fee based upon the nature, frequency and duration of the services requested by the XXX XXXXX (Tr. pp. 44, 56).
5. The business entered into a written agreement with each prospective XXX-XXXXXX, which specified that the relationship was not an employment relationship. (Tr. p. 32; Bd. Exh. 13).
6. None of the XXX-XXXXXXX made any significant monetary investment in the sales enterprise. All XXX-XXXXXXX already possessed current CPR certifications and experience in XXXXXX XXXX. Each XXX-XXXXXX could reject an offered assignment to a particular X owner. Before commencing services, the XXX-XXXXXX interviewed the XXX XXXXX to determine what services would be provided and what price should be charged (Tr. pp. 44-46, 49, 57; Bd. Exhs. 13, 15).
7. None of the XXXXXXXXXXXXXXX were prohibited from engaging in any other business or enterprise, although they were not free to make separate arrangements with any of the same XXXXXXXXXXXXXXX. Most XXXXXXXXXXXXXXX did other similar work elsewhere, and some advertised themselves (Tr. pp. 29, 34, 47, 48, 66, 71; Bd. Exhs. 10, 13). XXXXXXXXXXXXXXX could increase their earnings by offering additional services such as XXXXXXXXXXXXXXX XXXXXXX XXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX, for which they shared with the Employer 50% of the fees charged (Bd. Exh. 15). If a XXXXXXX reduced the price to a client, the reduction came out of his or her share (Tr. p. 49).
8. The XXXXXXXXXXXXXXX could substitute if the substitute XXXXXXXXXXXXXXX had a similar agreement with the Employer, and could hire similarly-qualified assistants without notifying the Employer (Tr. pp. 42, 43; Bd. Exh. 15).
9. The business provided no benefits or insurance, did not deduct taxes from the payments to XXXXXXXXXXXXXXX, and did not report them as employees (Tr. pp. 80, 81; Bd. Exh. 15).
10. XXXXXXXXXXXXXXX could not be discharged without cause. The written agreement required 60 days notice to cancel the contract (Tr. pp. 32, 74-77, 79; Bd. Exh. 12).
11. Following a tax audit, the Department concluded the XXXXXXXXXXXXXXX were employees of the Employer and that the XXXXXXXXXXXXXXX were paid wages. The Department assessed taxes for the quarters ending March 31, 2000 through December 31, 2001, plus penalties and interest (Tr. p. 8; Bd. Exhs. 8, 9).

The Employer contended that all of the XXXXXXXXXXXX, whose employment is in dispute in this case, were independent contractors, rather than employees. Specifically, the Employer contended that their efforts as XXXXXXXXXXXX who follow the directives of the XXXXXXXXXXXX, work more directly for the XXXXXXXXXXXX than for the Employer. The Employer contended that its business enterprise was a “matchmaker” service bringing together people who wanted to XXX for xxxx and people whose xxxx needed specific services. Former counsel described the business as “... a conduit to connect experienced, willing and independent XXXXXXXXXXXX with clients who need XXX-XXXXXXXX services.” (Bd. Exhs. 15, 19). The Employer cited *Dial-A-Messenger, Inc. v. AZ Department of Economic Security*, 133 Ariz. 47, 57, 648 P.2d 1053, 1057 (App. 1982), in support of its contentions.

The Department contended that the Employer acted as a “temporary services employer” and, as such, employed the XXXXXXXXXXXX and sent them to provide services for the Employer’s clients.

Arizona Revised Statutes § 23-615 defines “employment” as follows:

“Employment” means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01(A) provides in part:

Employee; definition; exempt employment

- A. “Employee” means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes. ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be affected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically

required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.
[Emphasis added].

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e.: (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor rather than an employee are enumerated in Arizona Administrative Code, Section R6-3-1723(E), i.e.: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

The Department has the burden of proof (Tr. p. 83). When applying the guidelines set forth in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes consideration of the following factors:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

None of the XXXXXXXXXXXXX informed the Employer that they used paid assistants, although they could have done so. This factor is neutral, with no impact on the crucial issue.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The xxxxxxxxxxxx instructions were provided by the XXXXXXXXXXXX, rather than by the Employer (Tr. pp. 42, 43). The Employer did not control legal responsibility for completion of tasks, and did not seek to be informed when tasks were completed. The Employer did not require an accounting or record when tasks were completed or missed. Control was not exercised by the Employer. This factor demonstrates independence.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

Although XXX owner instruction forms and contract forms containing mandatory language were provided by the Employer, the performance instructions came from XXXXXXXXXXXX rather than from the Employer. No performance review was undertaken by the Employer. An information sheet was used to prepare invoices to the clients (Tr. p. 56; Bd. Exhs. 11, 17). This factor indicates independence.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

For all XXXXXXXXXXXX, the work was performed entirely off premises. This factor indicates independence.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

Only the specifically-assigned XXXXXXXXXXXX was entitled to visit and provide services to each XXX. Substitution was possible only with another XXXXXXXXXXXX who similarly had signed a contract with the Employer. This factor indicates an employment relationship.

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

Specifications were provided by the XXXXXXXXXXXX, and XXXXXXXXXXXX were free to schedule their visits in any sequence using their own transportation (Tr. pp. 42, 43). XXXXXXXXXXXX were free to select the order of feeding, playing, etc. This factor indicates independence. We note that in *Dial-A-Messenger, supra*, options available to the drivers attenuated the control of the dispatcher who established the priority of each package assignment.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The XXXXXXXXXXXX would be replaced only upon request of the XXXXXXXXXXXX, or at expiration of their order for services. The XXXXXXXXXXXX could request another order, or not. Sixty days of notice before termination was required. (Exhs. 32, 33). No contractual penalty is specified for termination, including liquidated damages. This factor indicates independence.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The practice allowed each XXXXXXXXXXXX to keep irregular hours, within the parameters specified by each XXX owner (Tr. p. 53). This factor indicates independence.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

Only a brief orientation and assessment of skills occurred. No formal training was undertaken because all workers already possessed the appropriate skills, since most worked for licensed veterinarians. This factor indicates independence.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The practice allowed each XXXXXXXXXXXX to work irregular hours at will. Each xxxxxxxxxxxx instruction was task-oriented. No minimum level of time or periodic effort was specified by the Employer. The only expectation was that the XXX owner's requests would be satisfied. This factor indicates independence.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The only tools and materials involved were the food and medications provided by each XXX owner. No worker provided the means to do the job. This factor is neutral.

i. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

No expenses were reimbursable from the Employer. Occasionally, a XXX owner would ask the XXXXXXXXXXXX to acquire food or other items for their animal. The XXX owner would reimburse the XXXXXXXXXXXX. This factor indicates independence.

The following additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E), also are significant and appropriate for consideration in determining the relationship of the parties:

1. Availability to the Public

Generally, an independent contractor makes his or her services available to the general public, while an employee does not.

All XXXXXXXXXXXX were permitted to simultaneously engage in any other pursuits, except soliciting the Employer's clients. This factor indicates independence.

2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Payment was calculated strictly on a per job basis. This factor indicates independence, but is not dispositive because employees often work on commission.

3. Realization of Profit or Loss

An employee generally is not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in

connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

The XXXXXXXXXXXX were not required to invest anything beyond their personal time and efforts. Enhanced efforts beyond the requests by each XXX owner would not result in a higher payment, but lack of diligence would reduce the commission amount if the services were not completed. This factor indicates independence.

4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

Each XXXXXXXXXXXX could cease efforts at any time without penalty to the Employer. The lack of liquidated penalties for non-completion indicates employment (Tr. pp. 74-77).

5. Significant Investment.

A significant investment, by the worker, in equipment and facilities would indicate an independent status. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

The XXXXXXXXXXXX were not required or permitted to invest anything beyond their personal time, transportation, and efforts. Arizona does not require a license to perform these xxxxxxxxxxxx services (Tr. p. 78). This factor is neutral.

6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

All XXXXXXXXXXXX were permitted to work simultaneously for other XXXXXXXXXXXX or employers. Although any XXX owner was a potential customer, each XXXXXXXXXXXX was permitted to do any other work even in comXXXition with the Employer's business. The sole exception was that a XXXXXXXXXXXX could not perform

services for a client of the Employer except through the Employer. This factor indicates independence.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), other factors not specifically identified in the rule subsections also may be considered. The Arizona Court of Appeals, in the case of *Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given the long-established liberal construction in an effort to include as many types of employment relationships as possible, when the Court held:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals in the case of *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court ruled:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In this case, the factors that tend to support the Employer's contention of independent contractor relationship include the existence of signed "independent contractor agreements", lack of a professional license requirement, the consistent payment of per-job fees, the lack of micromanaged sales activities, the lack of paid assistants, the lack of instructions provided to XXXXXXXXXXXXX, the lack of required reports, the lack of provided tools or equipment or premises, and the expectation that XXXXXXXXXXXXX would provide their own transportation and would work on their own schedules within the confines of the XXXXXXXXXXXX' instructions.

Factors that are characteristic of independence include the absence of set hours for work, the lack of extensive training and meetings, the lack of office space provided to any of the XXXXXXXXXXXXX, and the freedom to work any hours suitable to the customer's requests. We conclude that the evidence of employee status does not outweigh these factors.

Presence of the control factor is not established in this case because the Employer did not reserve the rights to instruct, or to enforce the directives of XXXXXXXXXXXX (Tr. pp. 79-82). The Employer's consent to any services was not

a legally required or essential ingredient to any completed sales transaction. Liabilities arising from damage or departures from XXX owner instructions could run to the XXXXXXXXXXXX as well as to the Employer. The Employer was not required by law to include certain mandatory steps or language in each transaction with the public.

The Department has based its ruling largely upon its conclusion "... that the working relationships between [the Employer] and its workers were consistent with that of a temporary service employer." (Bd. Exh. 19). Counsel for the Department urged that the statutes have changed since *Dial-A-Messenger, supra*, notably Arizona Revised Statutes, § 23-614 (Tr. p. 91), which provides in pertinent part as follows:

* * *

- C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work. ...
- D. Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a leasing employer or a temporary services employer.
- E. A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services. A customer or client who contracts with an individual or entity that is not a professional employer organization or a temporary services employer to engage a worker to perform services is the employer of the worker who performs the services. Except as provided in subsection F of this section, an individual or entity that is not a professional employer organization or a temporary services employer, that contracts to supply a worker to perform services to a customer or client and that pays remuneration to the worker acts as the agent of the employer for purposes of payment of remuneration.

* * *

- G. A professional employer organization shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the professional employer organization.
- I. For the purposes of this section:
 - 1. "Professional employer organization" has the same meaning prescribed in section 23-561.
 - 2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:
 - (a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.
 - (b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
 - (c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.
 - (d) Assigns or reassigns the worker to perform services for a client or customer.
 - (e) Sets the rate of pay of the worker, whether or not through negotiation.
 - (f) Pays the worker from its own account or accounts.
 - (g) Retains the right to hire and terminate workers. [Emphasis added].

These provisions expressly stand as exceptions to the control requirements of Arizona Revised Statutes, § 23-613.01. However, the fact remains that this business has never held itself out as an "professional employer organization", nor as a "temporary services employer". Counsel pointed out that no evidence was presented regarding negotiation with any clients to meet all of the

requirements of Arizona Revised Statutes, § 23-614 (Tr. p. 96). We conclude that the Department did not meet its burden to establish that all of the statutory requirements were met, particularly the requirement that the temporary services employer must possess authority to assign or reassign the worker. The business owner described the providers of xxxxxxxxxxxx services as “vendors” who were not supervised, who were not trained by the business, who were not required to walk or to feed XXXXXXXX at certain times, who were not required to report on XXXXX XXXXXXXXXXXX, XXX XXXXXXXXXXXX XXXXX XXX XXXXXXXXXXXXXXXXXXXX XXX XXXXXXXXXXXX XXX XXXXXXXXXXXX supplies (Tr. p. 95), who were free to cancel or to reject assignments, and who could work with other clients introduced by this business or by others.

Counsel for the Department argued that the XXXXXXXXXXXXXXX were under the control of somebody, so that the question is whether they are employed by the client XXX XXXXX or by the Employer (Tr. pp. 91, 94). No contention that the XXXXXXXXXXXXXXX were directly employed by the client XXXXXXXXXXXX has been presented. Rather, the Employer, through counsel, has denied that the XXXXXXXXXXXXXXX were its employees and has contended that the XXXXXXXXXXXXXXX were independent contractors. We disagree with the premise that the XXXXXXXXXXXXXXX must be under the control of somebody else. Rather, the contractual relationships established in this case specify certain parameters of obligation, yet do not constitute the degree of authority and control required by an employment relationship.

We conclude that the factors tending to support an employer/employee relationship in this case include: the lack of any statutory exclusion from employee status when other industries are specifically excluded, the use of a fee schedule established by the Employer rather than by the XXXXXXXXXXXXXXX, a flow of funds from the client XXX owner through the Employer to the XXXXXXXXXXXXXXX, and the lack of significant investment by the XXXXXXXXXXXXXXX in the sales enterprise.

We find that absence of significant investment is outweighed by the risk of loss inherent in the event that a home visit unexpectedly requires more time and effort, or a visit is missed entirely, or a client does not pay, or damage occurs in the home, or transportation to the home becomes more expensive (Tr. pp. 31, 79-82). Similarly, we find that the exclusivity of the work efforts did not exist because each XXXXXXXXXXXXXXX was permitted to work simultaneously anywhere else other than soliciting existing clients (Tr. p. 33; Exh. 13). In addition, payment occurred on a per-job basis as specified within a written agreement (Tr. p. 93), which is consistent with an independent contractor relationship. Any of the XXXXXXXXXXXXXXX could hold their services out to the general public directly, and some did so (Tr. pp. 71, 72). No evidence was presented that the Employer issued W-2s, held itself out as a temporary services employer, or treated any individual as a statutory employee. Hence, these factors favor independence.

The enumerated factors that are not directly applicable to our considerations, based upon the evidence presented in this case, include the absence of evidence that any XXXXXXXXXXXX used paid assistants and the lack of required investments or licensing. These factors are neutral in this case.

We note that many of the factors upon which the original tax auditor based his conclusions, remain crucial. Many of his factors are not factually supported by the evidence in this case, and indeed are contradicted by the evidence in this case. Specifically, the auditor concluded that XXXXXXXXXXXXXXX are trained for a week and implied that the business owners give XXXXXXXXXXXXXXX keys and security codes to the XXX owner premises (Tr. pp. 11-19). The field auditor did not meet with any of the XXXXXXXXXXXXXXX (Tr. p. 20), and the factual or evidentiary basis underlying his conclusions was not adequately specified. These underlying factors are contradicted by the evidence.

We have thoroughly examined the factors established by the facts in this case, and we have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Subsections R6-3-1723(D) and (E). We conclude that the existence of signed "independent contractor agreements" in this case, which consistently were followed in practice, is a major factor towards removing the relationship from employment status for taxation purposes. We conclude that the services performed by individuals as XXXXXXXXXXXXXXX do not constitute employment.

Arizona Revised Statutes § 23-622(A) defines "wages" as:

"Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship.

In this case, the Employer paid fees to the XXXXXXXXXXXXXXX for xxxxxxxxxxxxxx services, according to an established schedule of fees. We conclude from the evidence that such remuneration to independent contractors does not constitute wages as contemplated by the applicable statutes and administrative rules. Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on July 6, 2005.

THE APPEALS BOARD **REVERSES** the Determination of Unemployment Insurance Liability issued on January 17, 2002.

THE APPEALS BOARD **REVERSES** the Determination of Liability for Employment or Wages issued January 17, 2002.

1. Effective January 1, 2000, services performed by individuals as XXXXXXXXXXXXXXX does not constitute **Employment** as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are not **Employees** within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
2. The remuneration paid to individuals for the services performed does not constitute **Wages** within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

3. The Employer is **not liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2000 through December 31, 2001, under A.R.S. § 23-613.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

**INSTRUCTIONS FOR FILING A REQUEST FOR
REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 229-2806.

A copy of the foregoing was mailed on
to:

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 XXX XXXXXXXX XXX
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By: _____
For The Appeals Board